Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BERJ BOYAJIAN, GORDON STEMPLE,
and STEMPLE & BOYAJIAN,

Petitioners,

v.

OLFACTO-LABS, WEISS ASSOCIATES,
ROBERT K. CRAWFORD and ROBERT GLYNN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE

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QUESTIONS PRESENTED

1. Do the Eighth, Thirteenth, and Fourteenth Amendments impose an objective test or a subjective limit on the amount of punitive damages which may be awarded against noncorporate defendants? If so, does a $10 million dollar award against two individuals exceed that limit?

2. Do the Eighth, Thirteenth, and Fourteenth Amendments allow a trial judge to fix the amount of punitive damages ($10 million in this case) on the basis of contingent future income rather than present income or assets, and impose interest which begins to run before the income is earned?

3. When a trial judge rather than a jury imposes punitive damages, does the Due Process Clause entitle the defendants to review free of "restraint" and without "deference" to the trial court?

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE

Berj Boyajian, Gordon Stemple, and the partnership of Stemple & Boyajian respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, Division Three, affirming the imposition of $10 million in punitive damages against these two individuals and their former law partnership.

OPINIONS BELOW

The opinion of the court of appeal [App. 54a-98a] is unreported, as is the trial court's decision [App. 1a-53a].

JURISDICTION

The California Court of Appeal affirmed the punitive damage judgment on September 28, 1994. The California Supreme Court denied petitioner's timely petition for discretionary review on January 5, 1995 [App. 131a]. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

The ruling on the federal issues presented – the constitutionality of California's method of assessing punitive damages and the excessiveness of the present award – is final (*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480, 95 S.Ct. 1029, 1037-1038 (1975); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124-127, 65 S.Ct. 1475, 1478 (1945)). While the state appellate court directed the trial court to reduce compensatory damages as to respondent Olfacto, and to explain its award of compensatory damages to respondent Crawford, it made clear that the reduction would not affect the punitive damages [App. 86a-87a].

STATUTES INVOLVED

California's punitive damages statute, Civil Code §3294, is set forth in App. 132a-133a.

STATEMENT OF THE CASE

Because this petition is limited to issues involving California's method of awarding punitive damages and the excessive award that method produced here, petitioners do not summarize the procedural history or their arguments relating to other aspects of the case.

A. The Parties and The Underlying Action

Petitioners Boyajian and Stemple are attorneys, who formerly practiced as the partners of petitioner Stemple & Boyajian. They had been retained by the plaintiffs in a case called "Crazy Horse." Petitioners began investigating, and obtained a preliminary injunction, then referred Crazy Horse to respondent Crawford, who agreed to handle the trial in exchange for a percentage of petitioners' contingent fee. Respondent Glynn agreed to finance Crawford's expenses in connection with Crazy Horse. Crawford won a verdict of approximately $4 million, later reversed by a decision of the California Supreme Court, *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 863 P.2d 795 (Cal. 1993) [App. 55a-58a].

Crawford retained respondents Olfacto-Labs and Weiss to act as expert witnesses in the Crazy Horse case. Eventually, Crawford and Glynn stopped paying the experts' bills. Olfacto and Weiss then threatened not to testify at the Crazy Horse trial unless petitioners would contract to pay them. Because of that, petitioner Stemple signed "Service Agreements" with Olfacto and with Weiss, which petitioner Boyajian learned about later [App. 59a-61a]. These agreements obligated petitioners to pay Weiss $31,000 and Olfacto $60,000, plus future charges [App. 60a-61a].

In 1988, Olfacto and Weiss sued Crawford and Stemple & Boyajian for their unpaid bills and for tort damages. They added petitioners Boyajian and Stemple as individual defendants in mid-trial, over petitioners' objections. Their liability theory was that petitioners had entered the Service Agreements without the intent to perform and that Crawford had not disclosed to them his inability to pay [App. 55a, 65a-72a].

Crawford cross complained against petitioners, claiming they had misrepresented the extent of their Crazy Horse trial preparation and the ease of prevailing, in order to persuade Crawford to take over the case [App. 73a-75a].

B. The Compensatory Damage Awards

The case was tried without a jury. The court issued a 38-page Statement of Decision, awarding contract damages, attorney's fees and fraud damages to Olfacto and to Weiss. The court found that petitioners had never intended to perform the Service Agreements, and for that awarded Olfacto $500,000 and Weiss $400,000 in fraud damages. Crawford was also found to have defrauded Olfacto and Weiss, but the court imposed only $200,000 in fraud damages for Olfacto, and $150,000 for Weiss, against Crawford [App. 4a-5a]. Weiss later conceded that, because it was a corporation, it was not entitled to recover for emotional distress, so the trial court reduced its fraud damages to $88,472.62. Olfacto did not concede the point, but the court of appeal directed the trial court to eliminate any emotional distress damages awarded to it [App. 97a-98a].

In addition, the trial court held that petitioners had defrauded Crawford into agreeing to handle the Crazy Horse case. Crawford was awarded $500,000 in compensatory damages against petitioners [App. 5a].

C. The Punitive Damage Awards

The trial judge was scathingly critical of petitioners, and imposed a total of $10 million in punitive damages ($4 million each to Olfacto and Weiss, and $2 million to Crawford), payable either by the partnership or half by Stemple and half by Boyajian [App. 6a]. Despite the

finding that Crawford had defrauded Olfacto and Weiss, the court did not punish him.

The punitive award rested on the trial court's findings that: (1) Petitioners Boyajian and Stemple had drawn $7.75 million from their law firm over the preceding four years [App. 31a]; (2) The firm had a net worth of $40 million, "a large portion" of which "consists of the law firm's present interest in future contingent fees from thousands of asbestos cases" [App. 32a][1]; (2) including the value of the partnership, petitioner Stemple's net worth was "in excess of $22,000,000", and petitioner Boyajian's "in excess of $29,000,000" [App. 32a].

D. The "Structure" of the Judgment

The trial court acknowledged that, because so much of petitioners' net worth was attributable to future contingent fees rather than their current assets, a lump sum award would cause petitioners to "lose most of the property which . . . they currently possess" [App. 34a]. Therefore, the court "structured" the judgment.

Compensatory damages were to be paid first. Then, petitioner Boyajian was ordered to pay $2 million of punitive damages. After this, petitioners were ordered to turn over to respondents 100% of any gifts, inheritances, and other assets they might receive, and 20% of their future *gross* income [App. 6a-8a, 35a-37a]. The court ordered that 10% interest begin to run immediately even though petitioners did not have the assets to pay the judgment yet [App. 8a].

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[1] In fact, there was no evidence that the law firm had *any* assets other than possible future income.

E. Issues Preserved (Rule 14(h))

Petitioners pointed out to the trial court that the amount of punitive damages "far exceeds anything permissible under . . . the United States Constitution", that unlimited discretion to assess punitive damages invites extreme results, that states are obligated to afford an adequate process for reviewing punitive damages, and that it is improper to take future expectancies into account in setting punitive damages [App. 139a-167a, 190a-191a].

On appeal, petitioners asserted the need for a process of review which provides a check on the factfinder's discretion, and for an objective standard circumscribing the amount of punitive damages [App. 172a-177a]. Their brief pointed out the arbitrariness of California's current punitive damage scheme [App. 173a], the perpetual bondage and due process violations resulting from assessing punitive damages without regard to the defendants' current ability to pay [App. 173a-178a, 193a-194a], and the questions then pending before this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. ___, 121 L.Ed.2d 532, 113 S.Ct. 594 (1992), in which the Court had recently granted certiorari [App. 173a].

F. State Appellate Court Decision

The court of appeal refused to consider petitioners' constitutional challenge to the state's method of assessing punitive damages. The opinion claimed petitioners' argument lacked authority and analysis [App. 82a], despite the fact that their opening brief both discussed the issues and quoted *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991) on the subjects of method of review [App. 172a-173a], lack of objective standards [App. 173a], and substantive

excessiveness [App. 177a], and their reply brief discussed the constitutional questions remaining after the decision in *TXO, supra* [App. 191a-193a].[2]

The court of appeal did review petitioners' claim that the $10 million was excessive punishment. It concluded that the sum was not "an unreasonable award . . . rendered by a runaway jury," but was instead "the result of measured deliberation by a conscientious judge" as to which the court was required to exercise "appellate restraint" out of "[d]eference to the trial court function" [App. 90a, internal quotation marks omitted].

The opinion said it applied three tests. The first one involved the nature of the wrongdoing: " '. . . the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal' " [App. 82a-83a, quoting *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 927-928, 582 P.2d 980 (Cal. 1978)]. The court did not say what it meant by the phrase "other factors".

The court of appeal adopted the trial court's findings that petitioners' false statements constituted "utterly reprehensible" conduct deserving of a punitive award that would set a "stark example" to other attorneys [App. 85a-86a].

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[2] Petitioners' discussion of these and all other appellate issues was necessarily short because the court of appeal had limited them to a 50-page brief, notwithstanding the fact that the trial transcript filled 36 volumes and it took the trial judge 38 pages merely to explain her decision.

Petitioners had argued that the length limitation violated due process, because it did not allow them to develop their arguments [App. 170a], but the state court refused to consider this point, again because it did not think petitioners discussed the subject thoroughly enough [App. 64a].

The second test the court of appeal applied was the amount of compensatory damages. The opinion says this criterion exists " '. . . only for the purpose of guarding against excess,' " but "[t]he particular circumstances of a case may require that we not allow an apparent disproportion between compensatory and punitive damages to nullify the punitive award" [App. 83a].

On this point, the court of appeal cited the portion of Justice Stevens's *TXO* opinion stating that the disparity between punitive and compensatory damages is not controlling in view of the magnitude of potential harm TXO's conduct might have caused had it succeeded [App. 86a-87a, citing *TXO, supra,* 509 U.S. ___ , 113 S.Ct. at 2721-2723]. Although there was no evidence in this case that petitioners' conduct threatened any harm except that for which the trial court compensated respondents, the court concluded that each of the three ratios between punitive and compensatory damages in this case – 4:1 for Crawford, 8:1 (or more) for Olfacto, and 45:1 for Weiss – was reasonable [App. 86a].

The third factor the court of appeal applied was wealth. The opinion says that the " 'most important question is whether the amount of the punitive damages award will have deterrent effect – without being excessive' " [App. 84a, quoting *Adams v. Murakami,* 54 Cal.3d 105, 111, 813 P.2d 1348 (1991)]. In this case, accepting the trial court's view that the partnership's gross future, contingent fees could be treated as part of petitioners' net worth for punitive damage purposes, the punitive damages constitued 17 to 23 percent of petitioners' combined net worth. The court of appeal concluded this amount was not shocking, but necessary to carry out the deterrent purpose of punitive damages [App. 87a-92a].

G. Constitutional Objections Reiterated

Petitioners asked the state supreme court to review the decision, to spell out the responsibilities of appellate courts in punitive damage cases, in light of the possibility that an outraged factfinder might impose an excessive award. They also asked the California Supreme Court to establish objective punitive damage guidelines and to foreclose reliance on speculative future contingencies in fixing the amount of punitive damages [App. 103a-105a, 109a-123a]. The Supreme Court denied review [App. 131a].

REASONS FOR GRANTING THE PETITION

Last year this Court noted that ". . . the Constitution imposes a substantive limit on the size of punitive damage awards" (*Honda Motor Company, Ltd. v. Oberg*, ___ U.S. ___ , 114 S.Ct. 2331, 2335 (1994)). This year, the Court granted review in *BMW of North America, Inc. v. Gore*, No. 94-896, partly to determine whether a mere $2 million punitive exaction is so "grossly excessive" that it violates the Fourteenth Amendment ("Summary of Orders," 63 U.S. Law Week 3555-3556, January 24, 1995).

The Court should review this award also, not only because it is five times larger than the one in *BMW*, but because it gives the Court an opportunity to elaborate on the nature of appellate review to which punitive damage defendants are entitled, and to analyze the effect of punitive damages on individual defendants in individual transactions.

At the time it was made, the punitive damage award in this case was described as the largest ever imposed against individual lawyers (Marcus & Geyelin, "Lawyers Told to

Pay $10 Million Damages," *Wall Street Journal,* March 20, 1991, Section B, page 5). The trial court recognized that, if enforced immediately, the judgment would deprive petitioners of "most of the property which . . . they currently possess" [App. 34a]. The judgment is structured to deprive petitioners not only of an immediate $2 million from Mr. Boyajian, but also of all future gifts or inheritances petitioners may receive, not to mention 20% of future *gross* income [App. 6a-8a].

The Constitution may permit corporal punishment, but it does not allow the state to mutilate defendants (*Furman v. Georgia,* 408 U.S. 238, 384 (1972) (concurring opinion of Burger, C.J.)). By the same token, even though the Constitution may countenance civil fines, it does not permit state courts to maim defendants financially. This decision illuminates the need for clear guidelines and independent review.

I.

PUNITIVE DAMAGES, ESPECIALLY WHEN AWARDED AGAINST INDIVIDUALS, SHOULD BE SUBJECT TO AN OBJECTIVE STANDARD OR SUBSTANTIVE LIMITATION.

Now that seven members of the Court have explicitly acknowledged the need for substantive limitations on punitive damages (*Honda, supra,* ___ U.S. at ___ , 114 S.Ct. at 2335), it is time to come to grips with a problem recognized by the California Supreme Court. "Deciding in the abstract whether an award is 'excessive' is like deciding whether it is 'bigger,' without asking 'Bigger than what?' " (*Adams v. Murakami, supra,* 54 Cal.3d at 110, 813 P.2d at 1350). Justice Kennedy made the point in more detail in *TXO, supra*:

> "To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists, and, in so doing, discourage legislative intervention that might prevent unjust punitive awards." (509 U.S. at ___ , 113 S.Ct. at 2725 (concurring opinion of Kennedy, J.).

A meaningful, nonfickle, standard for assessing punitive damages would not necessarily impose an absolute dollar cap on the amount of punishment, but it would at least provide a basis for setting damages by something other than ad hoc, gut reaction to a defendant's acts and/or attitude.

A. The Decision Below Demonstrates The Arbitrariness of California Punitive Damages Practice.

California has no such standard. The California punitive damages statute does not specify how damages are to be calculated [App. 132a-133a], and the "tests" set forth in California's leading cases on the subject are meaningless. The three criteria for assessing punitive damages in California are the nature of the defendant's

acts, the amount of compensatory damages awarded, and the defendant's wealth (*Adams v. Murakami, supra,* 54 Cal.3d at 110, 813 P.2d at 1350; *Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at 927-928, 528 P.2d at 990 (1978)). None of these cases has a precise definition or formula which would allow a punitive damage award to be evaluated either in terms of that definition or formula, or by comparison to the awards in other cases.

Instead, as the opinion below shows, the factors are circular, and flexible to the point of being illusory.

Conduct

" '. . . the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal' " [App. 82a-83a].

Amount of compensatory damages

"[T]here is no fixed ratio that determines the proper proportion between punitive and compensatory damages . . . Instead, we must examine each case in light of its particular circumstances and all three of the *Neal* criteria" [App. 86a].

Wealth

"The award will not serve as a deterrent if the defendant can absorb it with little or no discomfort . . . On the other hand, if, in light of the defendant's wealth and the gravity of the particular act, the award exceeds that necessary to punish and deter properly, it does not serve the function of punitive damages. [¶] Thus, 'the most important question is whether the amount of the punitive damages award will have deterrent effect – without being excessive' " [App. 83a-84a].

The illusory nature of those tests is well illustrated by the opinion's description of petitioners' conduct as "utterly reprehensible" [App. 85a]. Is the adjective "utterly" the standard for awarding $10 million in punishment, as opposed to $2 million or $5 million?

How does a factfinder decide whether one set of facts is more or less reprehensible than another? For example, what basis is there for determining that the conduct in this case – fraudulently inducing another lawyer to try a toxic tort case and inducing expert witnesses to testify – is five times more reprehensible than the conduct in *Honda,* selling a defective Honda which causes severe and permanent personal injuries?

How does a factfinder discern how much punishment will deter "without being excessive"? Does it take five times as much punishment to deter fraud by two individuals than it takes to deter an auto manufacturer from endangering the public?

In short, the standard for punitive damages in California boils down to whatever amount the factfinder thinks will constitute adequate deterrence. A factfinder's guess about how much punishment will deter the defendant or others is necessarily subjective and therefore arbitrary. Nor does California offer a consistent method of assessing wealth or evaluating conduct.

B. Objective Standards Could Easily Be Designed.

It is not this Court's function to tell the States what standards they should adopt, but it would be appropriate to suggest the *types* of standards which could provide objective enough guidelines to eliminate the problems of this (and similar judgments). One or a combination of tests would be suitable:

– An absolute dollar amount set according to the number of victims, the potential profitability of the defendant's conduct had it succeeded, etc.

– A preset multiple of compensatory damages, perhaps with a floor level of punishment to take care of "problem" cases in which the conduct was despicable but caused relatively little harm.

– A fixed percentage of the defendant's current income or present net worth, provided those terms are defined consistently, perhaps by reference to generally accepted accounting principles.

The States and Congress have been able to create constitutionally acceptable criminal sentencing schemes in which judicial discretion operates *within* preset limits. It cannot be any more difficult or less effective in the civil justice context.

II.

THE AWARD AGAINST PETITIONERS IS EXCESSIVE UNDER ANY TEST.

Assuming for the sake of argument that petitioners' conduct was as reprehensible as the lower courts found it, that does not mean that petitioners should be stripped of constitutional protection. In a sense, they come before this Court in the same posture a death penalty defendant does: If their conduct had not been perceived to be despicable, they would not be facing such awesome punishment.

Even when conduct is reprehensible, there are times when the suggested punishment is so arbitrary and so out of proportion to any legitimate deterrent or retributive consideration that it violates the Eighth, Thirteenth, and Fourteenth Amendments. This is such a case.

The judgment is so large that it will be impossible for petitioners to pay it during their lifetimes. Even the trial judge acknowledged that if a lump sum judgment were entered and plaintiffs executed on it, petitioners "would lose most of the property which the evidence reflects they currently possess" [App. 34a]. If future earnings expectations are disregarded, this judgment is for more than 90% of petitioners' net worth. Even if one accepts the trial court's approach, however, and uses possible future fees to measure current wealth, the judgment still constitutes 19.6% of petitioners' combined net worth.

The $5 million in punitive damages awarded against each of the individual petitioners was more than the gross sums they had drawn from their partnership in the preceding *five years*, and does not take into consideration the fact that their gross draw from the partnership does not reflect their net income, or the partnership's. The trial court made no finding on net income because there was no evidence on which to make that finding.[3]

Moreover, the trial court ordered that interest would begin to run on the punitive damages immediately, rather than as phantom future income might be collected. In California, interest on a $10 million judgment is $1 million per year. If, as the trial court found, petitioners jointly took a gross draw of $1.93 million per year from the firm ($7,750,000 divided by four years) [App. 31a], they would have to spend more than half of each year's draw just to pay interest on the punitive damage award.

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[3] Under California law, the burden of producing valid proof of petitioners' ability to pay was on respondents, as a matter of public policy (*Adams v. Murakami, supra*, 54 Cal.3d at 123, 813 P.2d at 1358-1360; *Tomaselli v. Transamerica Ins. Co.*, 25 Cal.App.4th 1269, 1282 [5a] (Cal.App. 1994)).

The other half of their income would likely go to taxes, leaving petitioners unable to support their families, let alone pay any of the principal amount of the punitive damages. In other words, the interest obligation alone would subject petitioners to perpetual bondage, in violation of the Thirteenth Amendment.

III.

WHEN A TRIAL JUDGE AWARDS PUNITIVE DAMAGES, THE DEFENDANTS ARE ENTITLED TO INDEPENDENT APPELLATE REVIEW TO PROVIDE A SAFEGUARD AGAINST EXCESSIVE AWARDS.

> "Judicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded" (*Honda, supra,* ___ U.S. at ___ , 114 S.Ct. at 2335).

The Court held in *Honda* that Oregon violated the Fourteenth Amendment by prohibiting judicial review of jury awards of punitive damages, notwithstanding that Oregon did provide other procedural protections for defendants (114 S.Ct. at 2341). The only difference between *Honda* and petitioners' case is that the trial judge, rather than a jury, was the factfinder who made the initial punitive damage award. Therefore, the court of appeal provided the only potential avenue of judicial review (in contrast to a jury trial, where the trial judge would scrutinize the jury verdict, and the court of appeal would review the trial court).

The fact that the initial factfinder is a judge instead of a jury does not guarantee against an excessive punitive damage award. Particularly in a state such as California, which does not have substantive limitations or objective standards for imposing punitive damages, an independent

reviewing court will be a defendant's only protection against a runaway factfinder.

Nevertheless, the court of appeal believed, because this judgment was rendered by a judge whom the appellate court deemed "conscientious", that "[d]eference to the trial court function requires appellate restraint' " [App. 90a]. Appellate restraint is the antithesis of the judicial safeguard *Honda* requires, as demonstrated by the decision in this case.

The part of the opinion discussing petitioners' wealth, and the level of damages "necessary to punish and deter properly" contains 71 sentences [App. 87a-92a]. 50 of them are direct quotes or paraphrases of the trial judge's findings. The opinion also comments on the trial judge's disdain for petitioners and disbelief of their testimony [App. 63a, 88a], but that attitude does not warrant exercise of appellate restraint. To the contrary, the more outraged the factfinder is at the defendants, the more important for a state to afford independent, dispassionate review.

> "What we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing"
>
> *Honda, supra,* ___ U.S. at ___, 114 S.Ct. at 2339.

"[U]nlimited jury discretion – or unlimited judicial discretion for that matter – in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities" (*Pacific Mut. Life Ins. Co. v. Haslip, supra,* 499 U.S. at 18, 111 S.Ct. at 1043).

By exercising restraint and deferring to the trial court, rather than applying objective standards to assess the award, the Court of Appeal allowed to stand a judgment which does not merely jar, but horrifies, constitutional sensibilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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